Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 - 1225
No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT L. KRAUSE,

Petitioner,

vs.

MARK K. KIM, M.D. d/b/a
MARK K. KIM, M.D., P.A.
and METROPOLITAN MEDICAL CENTER, a
corporation,

LAWRENCE A. FARBER, M.D. and NORAN
NEUROLOGICAL CLINIC, P.A.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* Donna J. Blazevic
Rebecca Egge Moos
BASSFORD, HECKT, LOCKHART & MULLIN, P.A.
Attorneys for Respondents Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A.
3550 Multifoods Tower
Minneapolis, Minnesota 55402
(612) 333-3000

* Counsel of Record

1987 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

QUESTION PRESENTED FOR REVIEW

WHETHER AN ORDER DENYING VACATION OF JUDGMENT BASED SOLELY ON STATE LAW IS PROPERLY REVIEWABLE BY THIS COURT ON WRIT OF CERTIORARI?

TABLE OF CONTENTS

	Page:
Table of Authorities.....	ii
Statement of the Case.....	1
Summary of Argument.....	3
Argument.....	3

TABLE OF AUTHORITIES

Cases:	Page:
Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194 (1902).....	6
Herb v. Pitcairn, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1954).....	5
Krause v. Kim, 379 N.W.2d 91 (Minn. Ct. App. 1985).....	
Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889 (1981).....	5
Federal Statutes:	
Title 28 § 1257(3).....	3
Supreme Court Rules:	
Rule 17.....	4
Rule 20.....	3
Rule 21.1(h).....	4

STATEMENT OF THE CASE

In 1982, petitioner sued Mark K. Kim, M.D., alleging medical malpractice in care rendered to him in December, 1979. Since the suit was not commenced within the time allowed by the statute of limitations, the trial court granted summary judgment in favor of respondent Dr. Kim.

On December 17, 1985, the Court of Appeals of the State of Minnesota affirmed the judgment in favor of Dr. Kim, Krause v. Kim, 379 N.W.2d 91 (Minn. Ct. App. 1985). On February 14, 1986, the Supreme Court of the State of Minnesota declined to review that decision.

Mr. Krause thereafter brought a motion before the trial court to vacate

the judgment in favor of Dr. Kim under Rule 60, Minn. R. Civ. P., on the grounds of clerical errors, mistakes, inadvertence and fraud. That motion was denied by the trial court on March 21, 1986. By order dated June 3, 1986, the Minnesota Court of Appeals, applying state law, held that the order was not appealable and that the appeal was not taken in good faith and awarded attorneys' fees. The Minnesota Supreme Court declined to review that decision on August 20, 1986, and on September 22, 1986 denied Mr. Krause's motion for reconsideration of the denial of his petition.

Petitioner now seeks review of the Minnesota Supreme Court's order dated September 22, 1986 declining to

reconsider its order denying the petition for review.

Petitioner does not seek review of the orders granting and affirming summary judgment. Nor could such a petition now be brought, due to the length of time that has passed, Rule 20, Supreme Court Rules.

SUMMARY OF ARGUMENT

The orders below were based solely on state law and are not properly reviewable by this Court on writ of certiorari.

ARGUMENT

Petitioner asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(3) (See Petition for Writ of Certiorari, page

3). Since none of the other language of the statute even arguably applies here, petitioner presumably invokes the Court's jurisdiction based on the phrase, "any title, right, privilege or immunity . . . specially set up or claimed under the Constitution". However, petitioner has failed to demonstrate that a federal question was timely raised, as required by the Rule. In addition, none of the considerations governing this Court's review on certiorari even arguably apply here. Rule 17, Supreme Court Rules.

Rule 21.1(h), Supreme Court Rules, requires the petitioner to specify in his petition for certiorari

> "the stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be

> reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The petition is utterly silent on this subject. in fact, no federal question was ever raised to the trial court or on appeal. Since no federal question was raised, this Court has no jurisdiction to entertain an appeal, and the petition should be denied. Webb v. Webb, 451 U.S. 493 (1981).

The decision that petitioner seeks to have reviewed was decided solely on

the basis of state law: specifically, Rule 60, Minn. R. Civ. P. and the state court decisions interpreting that rule. Since the decision rests on a matter of state law, there is simply no basis for review by this Court. Herb v. Pitcairn, 324 U.S. 117, 125 (1954).

The order for summary judgment and affirmance of that order are not before this Court on review. However, even if petitioner had sought timely review of those orders, he would not be able to establish that a federal question was properly and timely raised at the trial level. Nor would he be successful on the merits. The thrust of petitioner's frustration is directed at the fact that he was precluded by application of Rule

56, Minn. R. Civ. P., from presenting his case to a jury. His petition for certiorari belatedly attempts to raise the constitutionality of the summary judgment procedure. Even if this issue were properly before this Court, petitioner's challenge would not be successful. The constitutionality of the summary judgment procedure was upheld by this Court long ago. See, e.g., Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902).

CONCLUSION

No federal question was raised in or ruled on by the trial court. The decision complained of rests solely on a matter of state law. The constitutionality of the summary judgment procedure which underlies

petitioner's complaints here has already been established. The Petition should therefore be denied.

BASSFORD, HECKT, LOCKHART
& MULLIN, P.A.

By _____
Donna J. Blazevic *
(License No. 133772) and

By _____
Rebecca Egge Moos
(License No. 74962)
3550 Multifoods Tower
Minneapolis, Minnesota 55402
(612) 333-3000

Attorneys for Respondent
Mark K. Kim, M.D.

* Counsel of Record